Petition

81-1651

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ALEXANDER L. STEVAS,
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PHILLIP E. GALLOWAY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PHILLIP E. GALLOWAY

QUESTION PRESENTED

IS THE PROVISION OF THE MAIL FRAUD STATUTE REQUIRING THE USE OF THE MAIL TO FURTHER EXECUTE A SCHEME TO DEFRAUD SATISFIED WHEN

1. PETITIONER, AN ALABAMA WHOLESALE USED CAR DEALER, ROLLS BACK THE ODOMETERS ON USED CARS, SELLS THE CARS AT A CHICAGO AUTO AUCTION, AND RECEIVES ALL PROCEEDS FROM THE CARS; (THE SCHEME)

2. WISCONSIN AUTOMOBILE DEALERS PURCHASE THE CARS, TRANSPORT THEM TO WISCONSIN, AND MONTHS LATER RESELL THEM TO WISCONSIN CUSTOMERS;

3. WISCONSIN DEALERS MAIL TITLE APPLICATIONS FOR REGISTRATION TO A STATE AGENCY AFTER THE RETAIL SALES; (THE USE OF THE MAIL)

4. THE TITLE APPLICATIONS ARE VOID OF ANY ODOMETER INFORMATION.

CERTIFICATE OF INTERESTED PARTIES

The Undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

United States of America — Appellant
Phillip E. Galloway — Appellee
John A. Franke, Assistant United States Attorney — Attorney for Appellant
William J. Baxley, Baxley, Beck & Dillard — Attorney for Appellee
Charles A. Dauphin, Baxley, Beck & Dillard — Attorney for Appellee

/s/ WILLIAM J. BAXLEY
WILLIAM J. BAXLEY

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CITATION TO OPINIONS BELOW

The United States District Court for the Western District of Wisconsin entered an order and opinion on March 31, 1981, No. 80-CR-55, slip op. "W.D. Wis. March 31, 1981". See Appendix B.

The United States Court of Appeals for the Seventh Circuit rendered an opinion on December 17, 1981, reversing the District Court, 664 F.2d 161 (1981). See Appendix A.

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JURISDICTIONAL STATEMENT

On October 12, 1980, Petitioner was indicted for violating §1341 and §2 of Title 18, United States Code. On February 11, 1981, the initial indictment was superseded by an indictment alleging a violation of §1341 of Title 18, United States Code. On March 13, 1981, the jury returned a verdict of guilty. On March 31, 1981, the District Court granted the Petitioner's Motion for Judgment of Acquittal and set aside the jury verdict, opining that the use of the mails did not further the scheme to defraud.

On April 22, 1981, the United States of America filed a notice of appeal to the United States Court of Appeals for

the Seventh Circuit obtaining jurisdiction pursuant to Title 18, United States Code, §3731. On November 17, 1981, a divided Seventh Circuit Court of Appeals reversed the District Court and directed the jury verdict be reinstated. On December 1, 1981, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *In Banc*. On December 22, 1981, with no judge in active service having requested a vote upon the Rehearing *In Banc*, the Seventh Circuit by a split decision denied the Petition for Rehearing.

On January 8, 1982, Petitioner filed a Motion for Stay of Mandate Pending Application for Certiorari with the Seventh Circuit Court of Appeals. On January 15, 1982, the Seventh Circuit granted Petitioner's Motion for Stay of Mandate.

Petitioner invokes the jurisdiction of this Court pursuant to Rule 17 (1) (a) and (c) of the Rules of the Supreme Court of the United States.

STATUTES

18 U.S.C. §1341 (1980) states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or know-

ingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On October 12, 1980, the Petitioner was indicted for violating §1341 and §2 of Title 18, United States Code. On February 11, 1981, the initial indictment was superseded by an indictment charging the Defendant with violation of §1341 only. The trial of the case began on March 9, 1981, and continued through March 13, 1981. At the close of the evidence the Petitioner moved for a judgment of acquittal alleging that the mailings were not in furtherance of the scheme to defraud. The District Court reserved a ruling and the jury returned a verdict of guilty on all counts. On March 31, 1981, the District Court entered an opinion and order finding that the mailings were not in furtherance of the scheme, granting Petitioner's Judgment of Acquittal, and setting aside the jury's verdict.

The evidence at trial established that Petitioner was the owner and operator of Galloway Motors. Galloway Motors was an automobile wholesale business located in Alabama which purchased used cars, performed various "clean-up" tasks to ready the cars for resale, and then sold the cars to other car dealers, generally at auto auctions. Although Galloway Motors sold used cars at auto auctions throughout the United States, the sales made the basis of the indictment occurred at the Greater Chicago Auto Auction in Chicago, Illinois (hereinafter "the Auction").

During the eighteen months referred to in the indictment Petitioner sold 756 cars through the Auction, and approximately 4,800 dealers were registered to participate in the Auction.

On Thursday of every week, the Auction provided a market place for the sale of used automobiles, collecting a fee for the service from both the buyer and the seller. The Auction acted as an agent for the seller, and did not, in the ordinary course of business, take title to an automobile. The Auction guaranteed good and clear title to each automobile sold through the auction. The procedures were such that prior to the auction a seller would have no way of knowing which dealer, if any, would purchase a particular automobile.

In order to present an automobile for sale at the Auction, a seller had to present good title to the automobile and an odometer statement. Since Alabama was a title State at the time in question, Alabama dealers were required to produce both an Alabama "tag receipt" and a bill of sale. A seller at the Auction would present the title documents and odometer statement to the Auction personnel. The Auction then physically transferred the title documents and odometer statement to the successful bidder as a part of regular auction procedures. This transfer of title was accomplished without the use of United States mail.

As regards Petitioner, the evidence indicated that he had reduced the odometer readings on thirteen cars which were sold to other dealers. Nine of the thirteen cars were sold through the Auction and four were sold immediately outside of the Auction. The sales outside the Auction circumvented the auction block, auction fees, and competition from other buyers.

Of the eight Wisconsin dealers who purchased the cars in question, only Les Stumpf Ford purchased more than one car. The involvement of Les Stumpf Ford in six transactions was due to the close relationship between the principal buyer for Les Stumpf Ford and Petitioner. Upon the Wisconsin dealers' purchase of the automobiles, the auto-

mobiles were transferred to the dealers' respective businesses in the State of Wisconsin for resale. Twelve of the thirteen cars were resold to retail customers while one automobile was resold to another car dealer.

Upon the sale of an automobile by a Wisconsin dealer to a Wisconsin retail customer, the State law of Wisconsin required the registration of the automobile. Evidence of title and a title application form had to be sent to the State Department of Transportation. The Department of Transportation accepted title applications through the mail or by hand-delivery to one of eight Driver's License Examining Stations around the State. If, however, a Wisconsin dealer sold a used car to another automobile dealer, the dealer did not have to register the title with the Wisconsin Department of Transportation. If the Wisconsin dealer sold the automobile to someone outside the State of Wisconsin, no registration with the Wisconsin Department of Transportation was required.

The Wisconsin Department of Transportation received the title applications in issue in the ordinary course of business. These title applications and the documents of title were void of any information pertaining to the odometer mileage on the automobile.

Of the thirteen title applications received by the Wisconsin Department of Transportation from the Wisconsin dealers, eight were forwarded by mail. Of these eight, the government relied on six of the mailings for the six individual counts in the indictment.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Seventh Circuit Conflicts with Decisions of the Courts of Appeal for the District of Columbia Circuit, the Fifth Circuit, the Fourth Circuit, and the Third Circuit.

The Seventh Circuit's opinion held that the mailing of title documents in the following scenario constitutes mail fraud:

1. The Petitioner purchases used cars in Alabama, Kentucky, and Illinois.
2. The Petitioner reduces the odometer readings on said automobiles and sells them through the Auction to undetermined buyers.
3. The Petitioner receives his monies from the Auction and continues his business.
4. The purchasers, Wisconsin auto dealers, sell the automobiles to Wisconsin retail customers or other Wisconsin dealers.
5. After the retail sale of the automobiles to Wisconsin customers, the Wisconsin dealers mail title documents to the Wisconsin Department of Transportation.
6. The title documents are solely for the purpose of registering title and contain no information about the odometer readings on the automobiles.

This decision has eliminated the jurisdictional requirement that the mailing be "for the purpose of executing the scheme" and, in doing so, has contradicted decisions of other Circuits pertaining to mailings which are factually similar.

Petitioner argued before the Seventh Circuit Court of Appeals that the scheme to defraud was a scheme designed to obtain more money for used cars than they were worth.

Once Petitioner had received the proceeds from the sales, the subsequent transfer of title following a retail sale was irrelevant. The subsequent transfer of title did not affect the selling price, cause any money to flow to Petitioner, or contribute to the concealment of the fraud. The person who eventually obtained title was immaterial to Petitioner's scheme.

The Seventh Circuit, in a split decision, rejected Petitioner's and the District Court's reasoning and adopted the following nonsensical analysis. Petitioner, who sold 756 cars through the Auction during the time pertinent to the indictment, depended upon his continued access to Wisconsin dealers at the Auction, even though the Auction had approximately 4,800 dealers registered, and Petitioner could not know who would purchase his cars at the Auction. Still, the return of the Wisconsin dealers to the Auction turned on their experiences in profitably selling Petitioner's cars. The dealers experience in selling the cars turned on successful title transfer to their customers. The successful title transfer turned on the dealers mailing the title documents after the retail sales. Therefore, any failure in the title application would prevent the Wisconsin dealers from purchasing any of Petitioner's cars at the Auction, even though the Auction guaranteed good title.

The analysis of the Seventh Circuit fails in one major respect. The analysis fails to explain how the use of the mails to transfer title documents void of any odometer information affects a scheme designed to obtain more money from the sale of used cars through the rollback of odometers. To support its analysis the Seventh Circuit has blindly ignored precedents from other Circuit Courts of Appeals, has adopted results while rejecting the supporting rationale from other Circuits, and has directly contradicted precedents established by this Court.

In *United States v. Alston*, 609 F.2d 531 (1979), the Court of Appeals for the District of Columbia Circuit dealt with the mailings of installment contracts after the purchase of an automobile. In *Alston*, the defendants altered credit records by adding fictitious favorable information to credit files of individuals who had difficulty obtaining credit. The altered credit records would then be sent for approval to various lending institutions, which ultimately would allow the individuals to purchase automobiles. Having obtained loans for the purchase of the automobiles, the individuals would then purchase automobiles. Upon the purchase of an automobile, the automobile dealer mailed a conditional sales contract to the lending institution. This mailing was alleged to be in violation of the mail fraud statute.

The defendant in *Alston* argued that since the object of the scheme was to obtain an automobile, the scheme reached fruition once the car was driven off the dealer's lot. The government argued that the object of the scheme was to obtain credit and use of the automobile over the loan period. Therefore, according to the government, the mailing of the conditional sales contract after the individual had obtained credit approval and a car would be within the life of the scheme.

The D.C. Circuit held:

> The dealer's mailing of the contract, which contained the terms of payment and an assignment of the contract to the lending institution, neither furthered the objective of the scheme (i.e., obtaining a loan for the applicant) nor served to conceal the fraudulent representation. Although the signing of the installment contract may have been a completed step toward obtaining possession of the car, we believe the subsequent

> mailing was immaterial to the fraud perpetrated upon the lender by the borrower.
>
> 609 F.2d at 539.

The mailings in *Alston* and the instant case are factually similar. In both cases, the mailings occurred after the object of the scheme had been completed (i.e., the *Alston* individuals had obtained credit, and Petitioner had received the increased price of the automobiles due to the odometer rollback). In both cases, the mailings had no effect upon the success of the scheme.

In fact, the mailings in the instant case are further removed from the scheme than those mailings in *Alston*. In the instant case Petitioner had sold the automobiles at the Auction and received the increased funds due to the odometer rollbacks several months before the mailings, and the mailings consisted of title documents which were unrelated to the odometer readings on the automobiles. In *Alston*, the mailings occurred immediately after the purchase of the automobile and were directly related to that purchase in that the sale could not be finalized until the lending institution had obtained the assignment of title. Moreover, Petitioner could have cared less who bore the ultimate loss, while the *Alston* defendant intended that the lending institution bear the ultimate loss. Yet the Seventh Circuit ignored this precedent.

Instead, the Seventh Circuit relied upon the Fifth Circuit opinion in *United States v. Shryock*, 537 F.2d 207 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1976). Petitioner contends that reliance upon the limited holding in *Shryock* is misplaced. By erroneously applying the findings in *Shryock*, the Seventh Circuit's opinion conflicts with the rational of *Shryock*.

In *Shryock*, the defendant was a retail automobile dealer who tampered with an odometer reading of an automobile

sold to a retail customer. The mailing consisted of the mailing of an application for title between offices of the State Department of Transportation. The holding in *Shryock* was based on one fact: the title could not be transferred by the State of Florida unless the mileage certificate on the application for title had been completed. As the Fifth Circuit stated:

> Since the title would not be transferred by the State unless the mileage certificate was completed and filed with the application for change of title, the mailing of the DMV form 88's was essential to and for the purpose of executing the scheme. . . . (Citations omitted)
>
> 537 F.2d at 209.

The Court below relied upon *Shryock* for the proposition that the transfer of title is a necessary step in the sales transaction which is not completed until the title papers are processed. Therefore, the Seventh Circuit concluded that the retail sale of the automobiles to the Wisconsin customers was not concluded until the titles had been received by the Wisconsin Department of Transportation. The Court's opinion, however, failed to link the transfer of title to the fraudulent scheme, i.e., the rollback of the odometers resulting in an increased price for the sale of the automobile. In *Shryock* the link between the mailings and the fraudulent scheme was the odometer statement, the DMV form 88's, which had to accompany the title application. Otherwise, title would not be transferred. In the instant case there was no such connection between the mailings and the fraudulent scheme. The mailings contained no information about the odometer readings.

More importantly, the mailings in the instant case arose from the sales transactions between the Wisconsin dealers and the Wisconsin customers. The sales transactions be-

tween the Petitioner and the Wisconsin dealers had already been completed. The transfer of title from the sales transactions between Petitioner and Wisconsin dealers had been completed when the Auction hand delivered the title documents to the Wisconsin dealers. The subsequent mailing of title documents by the Wisconsin dealers had no effect upon the earlier sales transactions involving the Petitioner.

This point is further buttressed by the fact that the Auction guaranteed good title to the automobiles sold through it. Even if there had been a question about the subsequent transfer of title from the Wisconsin dealer to the Wisconsin customer, the inquiry would have led to the Auction and not to Petitioner.

Furthermore, in *Shryock* the defendant himself was a party to the transaction which caused the use of the mail. In the instant case the Petitioner was not a party to the transaction which caused the use of the mail and was not concerned with the completion of that transaction. Quite simply, Petitioner was concerned only with the price at which his cars sold at auction. The Seventh Circuit has arbitrarily grasped the holding in *Shryock* and abandoned the reasoning supporting that decision.

The Seventh Circuit opinion is also in conflict with the opinion of the Fourth Circuit in *U. S. v. Keenan*, 657 F.2d 41 (4th Cir. 1981). Although the facts in *Keenan* do not involve the sales of automobiles, the mailings in *Keenan* are procedurally similar to the instant mailings. In *Keenan* the defendant had arranged with a truck driver to obtain two pallets of roof pinning bits. The truck driver, employed by the Marathon Coal Bit Company, Inc., picked up the pallets of bits from another company, Carboloy, using the name of Marathon. The truck driver then sold the bits to the defendant. The use of the mails arose when Carboloy mailed an invoice to Marathon for the two pallets.

The Fourth Circuit held that the mailing occurred after the scheme had reached fruition (after the Defendant had received and paid for the bits); that the mailing was made by a party, Carboloy, not associated with the fraudulent scheme; that the mailings may have contributed to the detection of the scheme. In the case sub juidice the documents were mailed after Petitioner had received his monies; the mailings were made by parties not connected with the fraudulent schemes; the retail sale of the automobile which resulted in the mailing could only contribute to the detection of the scheme since the odometer tampering could only be discovered through the use of the automobile and the determination that the automobile had been subjected to more mileage than that indicated. Thus, the opinions are in conflict.

Finally, the Seventh Circuit opinion conflicts with the opinion of the Third Circuit in the case of *United States v. Tarnopol,* 561 F.2d 466 (3rd Cir. 1977). In the Court below Petitioner contended that the mailing of the title documents were routine mailings occurring in the ordinary course of business and therefore exempt from the mail fraud statute under *Parr v. United States,* 363 U.S. 370 (1960) and its progeny, *Tarnopol.* The Seventh Circuit denied this contention on the basis that the mailings in *Shryock* were "legally required" yet formed the basis of the mail fraud statute. This analysis ignores the ruling of the Third Circuit in *Tarnopol.*

In *Tarnopol,* the defendants were officers of corporations engaged in the business of producing, marketing and selling phonograph records. The defendants were charged with not recording on the corporations' books sales of over $350,000.00 — using the proceeds of the unrecorded sales to create a fund out of which improper payments were made to disc jockeys and program directors of radio stations to

secure favored treatment of the corporation's recordings — defrauding the United States by impeding functions of the Internal Revenue Service. The mailings which allegedly violated the mail fraud statute consisted of copies of "packaging slips" which were mailed to the corporation's offices by an independent distributor to confirm the shipment of records to customers. The copies of the packaging slips were then kept for accounting purposes. The fraud occurred when the defendants would conceal the copies of the packaging slips, thereby preventing records of the sales and shipments from being recorded.

In *Tarnopol* the Third Circuit, reasoning from *Parr v. United States*, supra, decided there is no

> valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise. In either case the mailings themselves are not sufficiently closely related to the fraudulent scheme to support a mail fraud prosecution.
>
> 561 F.2d at 472.

The transfer of the title documents through the post office was nothing more than a routine mailing performed by the Wisconsin dealers as a service to their customers. The Wisconsin dealers were legitimate business enterprises and the mailings were intrinsically innocent.

II. The Decision of the Seventh Circuit is in Conflict with Prior Decisions of This Court.

In reaching its decision that the mailing of the title documents furthered Petitioner's odometer rollback scheme the Seventh Circuit took great pains to distinguish *United States v. Maze*, 414 U.S. 395 (1974). Yet the Court could

only superficially distinguish *Maze* upon the fact that the mailings sub juidice were not "counterproductive" to the scheme.

In *Maze* the defendants used a stolen credit card to charge food and lodging at several motels. The use of the mails occurred when the merchants mailed the sales slips of the purchases to the bank which would in turn mail them to the owner of the credit card. In holding that the mailing did not further the scheme, this Court opined:

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss.
>
> 414 U.S. at 402.

In *Maze* the government further argued that the success of the credit card scheme depended upon the delay caused by the use of the mails, and relied on *United States v. Samson*, 371 U.S. 75 (1962). In distinguishing *Samson*, this Court reasoned that the mailings from the motel owners to the bank were not designed to lull the victims into a false sense of security, but increased the likelihood of detection.

In distinguishing *Maze*, the Seventh Circuit seized upon the latter dicta and ignored the crux of the holding in *Maze*. As stated by Justice Swygert in his dissenting opinion:

> The majority has narrowed the holding in *Maze* to one sentence: There is no mail fraud liability where the mailings increased the probability that the fraudulent scheme would be detected. *Maze* does not stand for this proposition. *Maze* said that the mailings involved did not further a scheme to defraud in a specific fact situation. The fact that the mailings increased the likelihood of detection was only evidence that they did not further the scheme; it was not the crux of the hold-

> ing. Any other conclusion ignores the fact that many mailings may both further the scheme *and* increase the likelihood of detection. Given this, it must be determined whether the facts in *Maze* are analagous to the facts in this appeal. I believe that they are. In both cases, the transactions from which the mailings arose were essential to the completion of the scheme. In both cases, the mailings were a normal concomitant of the essential transaction. In *Maze*, the scheme did not depend on who bore the loss; here, the success of the scheme did not depend on how the transfer of title was completed. In *Maze*, whomever ended up with the invoice bore the loss. In this case, whoever ends up with title bears the loss. I fail to see any valid distinction between the facts in this case and *Maze*. Despite all these similarities, the majority focuses on the one difference between the two cases and dismisses *Maze* as precedent. As pointed out above, the solitary distinction was not essential to the holding in *Maze*. (Emphasis original.)
>
> 664 F.2d at 167.

Although the Seventh Circuit attempted to distinguish *Maze*, it took no steps to distinguish *Kann v. United States*, 323 U.S. 88 (1944), the predecessor of *Maze*. Again, Justice Swygert's dissent has articulately stated Petitioner's argument:

> *Kann v. United States*, 323 U.S. 88 (1944), is also analagous. In *Kann*, corporate officers and directors were accused of diverting profits from their own corporation to a dummy corporation. As part of the scheme, the Defendants obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. The Supreme Court held that the fraud was completed at the point at which Defendant cashed the checks:
>
> > The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them,

> or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires. 323 U.S., at 94.

> As in *Kann*, Galloway had irrevocably received the money from the fraud. It was immaterial to him how the title to the car was transferred from the dealer to the consumer.
>
> 664 F.2d at 167.

Maze and *Kann* offer one final comparison to the instant case. In this case the Seventh Circuit viewed Petitioner's scheme as a continuing scheme which required continuing access to Wisconsin retail dealers through the Auction. The Seventh Circuit opined that this continuing access turned upon the dealers experiences in profitably selling automobiles purchased from Galloway. In order for the dealers to resell the automobiles, the title documents had to be mailed to the appropriate State agency. Consequently

> Only the experience of successful title transfer, therefore, would induce the dealer to return to the auction and purchase other automobiles from Galloway. Any failure in the title application process would have endangered Galloway's scheme by discouraging the retail dealer from making further purchases of his automobiles.
>
> 664 F.2d at 165.

A similar argument was made by the government in both *Maze* and *Kann*. In *Maze* the government argued that the defendant engaged in a continuing fraudulent credit card scheme involving fraudulent purchases in three states. In fact the continuing nature of the fraudulent credit card scheme in *Maze* led to the dissenting opinion of Justice White. Yet, the majority of the Court held that the scheme

reached fruition when the defendant checked out of each motel.

In *Kann*, the government argued that the scheme was not complete because the defendants expected to receive further bonuses and profits and the clearing of checks was essential to that purpose. Yet the Court ruled

> But, even in that view, the scheme was completely executed as respects the transactions in question when the Defendants received the money intended to be obtained by the fraud and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it.
>
> 322 U.S. at 95.

In light of this Court's decision in *Maze* and *Kann*, the attenuated connection between Petitioner and his continued access to dealers is without precedent. This becomes readily apparent when Petitioner's interaction in the market is realistically viewed. Principally, Petitioner was one of 4,800 dealers registered at the Auction. During the time pertinent to the indictment, Petitioner sold approximately 756 cars, of which there was evidence of rollbacks on only thirteen. Petitioner did not know who would purchase his cars at the Auction. The Auction guaranteed title to the cars. The contention that title transfer was necessary to insure Petitioner's continued access to the Auction is nonsensical.

Finally, the Seventh Circuit's opinion must be reviewed in light of this Court's opinion in *United States v. Samson*, 371 U.S. 75 (1962). In *Samson*, this Court found that the mailing of accepted loan applications, together with a form letter assuring the victims of performance of their contracts, after the fruits of the scheme had been received, was in furtherance of the scheme to defraud. The Court held that this mailing constituted a deliberate, planned use of the

mails after the victims' money had been obtained. *Samson* is the only opinion issued from this Court wherein the mailing of documents after the fruits of the scheme have been received has fallen under the mail fraud statute.

The distinction between *Samson* and the present case is readily discernible. Petitioner in no way planned the deliberate use of the United States mail by the Wisconsin dealers. The mailing of the title documents did not affect the price paid for the car. They did not conceal the alteration of the odometer. They did not cause any benefits to flow to Petitioner. They did not cause any further harm to the Wisconsin customers. Still, the Seventh Circuit has opined that these mailings, occurring months after Petitioner received the proceeds from the sale of the used cars, somehow further executed the scheme to defraud.

CONCLUSION

The decision of the Seventh Circuit directly conflicts with the rationale of the mail fraud statute as it has been established by other Circuit Courts of Appeal, and ignores the precedents set down by this Honorable Court. Petitioner respectfully requests this Court to grant his Petition for Writ of Certiorari, and upon further consideration, to reverse the decision of the Seventh Circuit, and uphold the District Court's Judgment of Acquittal.

STATEMENT OF SERVICE

I hereby certify and affirm that on this, the ..... day of February, 1982, copies of the foregoing petition were mailed, with first class postage prepaid and properly addressed, to the following:

John A. Franke, Assistant United States Attorney
Western Division of Wisconsin
P. O. Box 112
Madison, Wisconsin 53701

Willy Baxley
WILLIAM J. BAXLEY

Sworn to and subscribed before me on this 16th day of February, 1982.

Carol Ann Seifert
Notary Public

Appendix

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Phillip E. GALLOWAY,
Defendant-Appellee.

No. 81-1693.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 16, 1981.
Decided Nov. 17, 1981.

Following jury verdict of guilty in prosecution for mail fraud, the United States District Court for the Western District of Wisconsin, Barbara B. Crabb, J., directed verdict for defendant, and the United States appealed. The Court of Appeals, Sprecher, Circuit Judge, held that defendant, a wholesaler of used automobiles, could be convicted of mail fraud for his involvement in continuing scheme to defraud automobile purchasers by rolling back odometers.

Reversed and remanded with directions.

Cudahy, Circuit Judge, concurred and filed opinion.

Swygert, Senior Circuit Judge, dissented and filed opinion.

1. Post Office 35(8)

Wholesaler of used automobiles, who engaged in continuing scheme to defraud automobile purchasers by rolling back odometers, could be convicted of mail fraud, since jury had sufficient evidence from which it could conclude that defendant's scheme was not complete until cars had been resold to retail customers in Wisconsin and requirement of mail fraud statute that mailing occur "for the purpose of executing the scheme" to defraud was satisfied by retail dealer's apply-

ing for title on behalf of retail purchaser by mailing required documents to Wisconsin Department of Transportation. 18 U.S.C.A. § 1341.

2. Post Office 35(6)

That defendant could reasonably have foreseen mailings is the only causation required by mail fraud statute. 18 U.S.C.A. § 1341.

John A. Franke, U. S. Atty., Madison, Wis., for plaintiff-appellant.

William J. Baxley, Charles A. Dauphin, Birmingham, Ala., for defendant-appellee.

Before SWYGERT, Senior Circuit Judge, and SPRECHER and CUDAHY, Circuit Judges.

SPRECHER, Circuit Judge.

This case involves the application of the federal mail fraud statute, 18 U.S.C. § 1341 (1980), to a scheme to defraud automobile purchasers by "rolling back" automobile odometers. Following a jury verdict of guilty, the trial court directed a verdict for the defendant. Because we find that the jury properly could have found that this scheme falls within the strictures of the federal statute, we reverse the trial court's ruling.

I

Defendant Galloway is an Alabama wholesaler of used automobiles. On February 11, 1981, an indictment was returned alleging that Galloway had engaged in a scheme to defraud Wisconsin automobile purchasers by altering the odometer readings on used cars and then selling those automobiles to retailers. This indictment relied on the third prohibited act of the mail fraud statute, which makes it a crime to "knowingly [cause matter] to be delivered by mail [in

furtherance of a fraudulent scheme],"[1] and alleged six specific mailings.

The evidence at trial established odometer rollbacks on thirteen automobiles purchased by Wisconsin residents from retail dealers. All these automobiles had been sold to retail dealers by Galloway, primarily through the Greater Chicago Auto Auction, although a few had been sold directly to a dealer whom Galloway had come to know personally. The Wisconsin dealers would ship or drive the automobiles to Wisconsin, where they were eventually sold to retail customers. In order to finalize this purchase, the Wisconsin dealer would apply for title on behalf of the retail purchaser by mailing the required documents to the State Department of Transportation. These title applications constituted the requisite mailings which supported the mail fraud indictment.

The trial court found that the jury had sufficient evidence to find that Galloway had formulated and carried out a scheme to defraud. The evidence showed that the scheme resulted in the automobile dealer, and ultimately the retail customer, paying a higher price for these automobiles than their actual market value.

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[1] 18 U.S.C. § 1341 (1980) states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The trial court also found that the jury had sufficient evidence from which it could find that Galloway "caused" the mailing of title applications by Wisconsin dealers, in that he "could reasonably have foreseen that the mails would be used in the course of transferring physical possession and title of the cars to retail customers." *United States v. Galloway*, No. 80-CR-55, slip op. at 3 (W.D.Wis. March 31, 1981).

The court ruled, however, that the jury did not have sufficient evidence from which to find that the use of the mails was "for the purpose of executing" Galloway's scheme to defraud. *Id.* The court found that the mailings alleged did nothing to further Galloway's scheme of obtaining more money for the cars, since the transfer of title accomplished by the mailings would have occurred at whatever price the automobiles were sold. Galloway's scheme, the court found, "was complete for his purposes when the retail customer agreed to the selling price and took physical possession of the car." *Id.* at 4. The mailings, therefore, occurred "chronologically after the scheme had reached fruition; . . . [and] did nothing to affect the price paid for the car or to conceal the alteration of the odometer." *Id.* at 8. Thus, the court directed a verdict for Galloway following the jury's guilty verdict.

II

A

[1] The starting point for analysis of a conviction under the mail fraud statute is determining the scope of the alleged scheme. The district court accepted the government's contention that Galloway's scheme was an attempt to defraud Wisconsin retail purchasers, who based their decision to purchase the automobiles upon the altered odometers. The evidence at trial indicated that the higher wholesale cost of automobiles resulting from the odometer tampering was reflected in higher prices at the retail level. Thus, the victim of this fraud was the retail customer. Furthermore, retail

purchasers were "crucial to defendant's ability to continue the scheme." *Id.* at 6. While Galloway on appeal contends that this is an overly broad reading of the scope of the scheme, we find that the jury had sufficient evidence from which it could conclude, as the court below noted, "that the defendant's scheme was not complete until the cars had been resold to retail customers in Wisconsin." *Id.*

Having determined the scope of the scheme, we turn to an examination of the applicability of the mail fraud statute to the scheme.[2] This examination demonstrates that the mailing of title documents satisfies the requirements of the statute.

While the statute requires that the mailing occur "for the purpose of executing the scheme" to defraud, *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954), the courts have given a broad interpretation to this phrase, and have held that mailings "in furtherance" of the scheme meet the statute's jurisdictional requirement, *United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975), *cert. denied*, 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976). Thus, in *Ohrynowicz v. United States*, 542 F.2d 715 (7th Cir.), *cert. denied*, 429 U.S. 1027, 97 S.Ct. 650, 50 L.Ed.2d 630 (1976), this court applied the mail fraud statute to a "check-kiting" scheme in which the defendant utilized the temporary, non-personalized checks provided by banks upon opening a new account to defraud several banks. The mailing upon which the mail fraud conviction rested, however, was the mailing to the defendant of personalized checks ordered when the accounts were opened, but never used by the defendant.

The court found that the mailings were "for the purpose of executing" the scheme to defraud. It noted that while the personalized checks were never used, the ordering of such

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[2]In defining the scope of the scheme in this manner, we do not imply that it was not of a continuing nature. As our discussion in Part II-B *infra* notes, defining the scheme here as ongoing provides further support for application of the mail fraud statute in this case.

checks "was a normal part" of opening an account, thus "leading to the conclusion that the order was in furtherance of the fraudulent scheme." *Id.* at 718. *Ohrynowicz* has been interpreted to hold that where a mailing was a "normal concomitant of a transaction that was essential to the fraudulent scheme, [the mailing] was made for the purpose of executing that scheme." *United States v. Clark*, 649 F.2d 534 at 542 (7th Cir. 1981); *United States v. Lea*, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 823, 101 S.Ct. 82, 66 L.Ed.2d 25 (1980).

The application of the court's holding in *Ohrynowicz* to the facts in the instant case clearly demonstrates that the requirements of the mail fraud statute are satisfied. Here the final step in the scheme, as found by the district court, was the retail sale of automobiles. This essential transaction was not complete until the title documents were mailed to the responsible state agency, which then transferred title from the dealer to the retail purchaser. These mailings were thus *more* than "normal concomitants" of an essential transaction, they were an integral part of that transaction. They were essential to executing the scheme to defraud.[3] *See also United States v. Kent*, 608 F.2d 542, 546 (5th Cir. 1979), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980) ("The requisite statutory purpose exists if the alleged scheme's completion could be found to have been dependent in some way upon information and documents passed through the mails").

The application of the mail fraud statute to a similar fact situation was upheld by the Fifth Circuit in *United States v.*

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[3]The court below distinguished *Ohrynowicz*, as well as other Seventh Circuit cases applying the mail fraud statute, on the grounds that there the mailings occurred chronologically after the "fruition" of the scheme to defraud. Here, however, the scheme was not in fact completed until a retail sale was made, and the mailings were necessary to complete the sale. The fact that Galloway received his money before these mailings does not change our conclusion, for "a fraudulent scheme may depend on a mailing even after the defrauders have received the sought-after money or documents." *United States v. Kent*, 608 F.2d 542, 546 (5th Cir. 1979), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980).

Shryock, 537 F.2d 207 (5th Cir.), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1976). There, the court upheld a mail fraud conviction stemming from a scheme to alter odometer readings on used automobiles and resell the autos to retail purchasers. At the time of the sale the dealer would hand-deliver title applications and mileage certificates to a local division of the State Motor Vehicle Department, which then mailed these documents to its office in the state capital. Noting that "[t]he transfer of title is a necessary step in the sales transaction which was not actually completed until the title papers passed," the court found these intra-governmental mailings to have been in furtherance of a scheme to defraud. *Id.* at 209. While the documents in *Shryock* included an indication of the odometer reading, this alone did not further the defendant's scheme, and indeed may have endangered the scheme. *See United States v. Maze*, 414 U.S. 395, 403, 94 S.Ct. 645, 650, 38 L.Ed.2d 603 (1974) (no mail fraud statute liability where mailings increased the probability that the fraudulent scheme would be detected). Nor does the fact that *Shryock* involved the direct sale of automobiles to retail purchasers distinguish it from this case. Both schemes had as their ultimate objective a sale to a retail customer. The interposition of a wholesale buyer in this case does not change the role that transfer of title plays in completing the scheme. Thus, *Shryock* stands for the proposition that where a sale to a retail customer is the final object of a scheme to defraud, mailings of title documents necessary to complete the sale are made "for the purpose of executing" the scheme.[4]

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[4]*Shryock* also demonstrates the fallacy in Galloway's argument that the mailings in this case were "routine business mailings," and therefore exempt from mail fraud strictures under *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), and related cases. The mailings in *Shryock* were legally required, yet the court found the mail fraud statute to be applicable nevertheless. The mailings in *Parr* were totally unrelated to, and indeed predated, the scheme. Here, however, as in *Shryock*, the mailings were inexorably tied to an essential step in the scheme. *See United States v. Fein-*

B

Our analysis to this point has not dealt with the continuing nature of Galloway's scheme. An examination of this aspect of the scheme provides further support for the conclusion that Galloway's conduct is properly punishable under the mail fraud statute.

Although the district court did not discuss it, a major emphasis of the government, in both the indictment and at trial, was the ongoing character of Galloway's scheme. Thus, for example, evidence was introduced of odometer rollbacks on automobiles that were not subjects of the indictment, in order to demonstrate that Galloway's scheme extended beyond individual sales. Furthermore, the amount of profit realized by Galloway on each individual sale could well have caused the jury to conclude that Galloway's scheme was of the ongoing nature alleged in the indictment.

The ongoing nature of the scheme, therefore, required a *continuing* access to retail dealers, principally through the Greater Chicago Auto Auctions. This access, in turn, depended upon the retailers' experiences in profitably selling automobiles obtained from Galloway. In order to sell his cars at the auction, it was necessary for Galloway to provide the dealer-purchasers, through the auction, with the necessary title documents. In order for the dealer-purchasers to then sell these cars, it was necessary for them to transfer title by mailing these title documents to the appropriate state agency. Only the experience of successful title transfer, therefore, would induce the dealer to return to the auction and purchase other automobiles from Galloway. Any failure in the title application process would have endangered Galloway's scheme by discouraging the retail dealer from making further purchases of his automobiles. Furthermore, the evidence at trial suggested that those attending the auction frequently knew and spoke with each other. From this, the

berg, 535 F.2d 1004, 1009 (7th Cir.), *cert. denied*, 429 U.S. 929, 97 S.Ct. 337, 50 L.Ed.2d 300 (1976).

jury could conclude that the effect of a failure in the title application process would be to discourage purchases among a host of dealers.[5]

[2] Thus, the title application procedure, from Galloway's provision of the title documents to their mailing to the state agency,[6] was an essential step in Galloway's scheme. The success of this step ensured his continued ability to reap the profits of his odometer tampering.

C

Galloway argues that the Supreme Court's decision in *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), precludes his liability under the mail fraud statute. The facts in the two cases, however, are readily distinguishable. In Maze the defendant had been convicted on four counts of mail fraud arising from his theft and use of a "Bank Americard" credit card. The alleged violation of the mail fraud statute stemmed from the fact that, in using the card, the defendant "knew that each merchant would cause the sales slips of the purchases to be delieverd by mail to the Louisville bank which would in turn mail them to [the cardholder] for payment." *Id.* at 397, 94 S.Ct. at 647. The Court found that these facts failed to demonstrate a violation of the mail fraud statute.

The Court emphasized that the statute, although it has been read broadly, nevertheless requires that the requisite mailings be " 'for the purpose of executing the scheme.' " *Id.* at 400, 94 S.Ct. at 648, quoting *Kann v. United States*, 323

[5]While the sale of automobiles occurred through the auction, there was, as the court below noted, substantial evidence from which the jury could conclude that problems in the title application process of Galloway's cars could be traced to him.

[6]As the district court noted, the evidence supported the finding that Galloway caused the mailings at issue, in the sense that he could reasonably have foreseen their occurrence. This, of course, is the only causation required by the mail fraud statute. *Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 362-63, 98 L.Ed. 435 (1954).

U.S. 88, 94, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944). In *Maze*, however, the mailings were "directed to the end of adjusting accounts" between the various victims of Maze's scheme. 414 U.S. at 402, 94 S.Ct. at 649. The Court noted that "there is no indication that the success of this scheme depended in any way on which of his victims ultimately bore the loss." *Id.* Indeed, the Court emphasized, these mailings *endangered* Maze's scheme, by furthering the likelihood of detection. *Id.* at 403, 94 S.Ct. at 650. Given this fact, the mailings could not fairly be said to have been in furtherance of the scheme.

Here, on the other hand, the evidence demonstrated that these mailings were necessary to complete the retail sale which was the final object of the scheme, as well as to ensure the ongoing success of the scheme. While it is true, as the trial court noted, that failure to pass title would not necessarily have resulted in discovery of the scheme, it would have endangered its continued success. Certainly the mailings were not *counterproductive* to the scheme, as were the mailings in *Maze*.[7] In this case, therefore, the mailings may fairly be said to have been for the purpose of executing the scheme to defraud.

III

We conclude that Galloway's scheme to defraud falls within the prohibitions of 18 U.S.C. § 1341 (1980). Therefore, the district court's judgment of March 31, 1981, is Reversed, and the cause is Remanded with directions that the district court reinstate the jury verdict of March 13, 1981.

CUDAHY, Circuit Judge, concurring:

With the mail fraud statute we are writing on anything but a clean slate. Although the present case takes us to what (for now) may be the outer limits, our result, as Judge Sprecher has ably demonstrated, does no real violence to the

[7]Galloway admits this fact by emphasizing that nowhere on the title document is an odometer reading required. Such a requirement, of course, might have made detection of the scheme more likely.

precedents. I am sensitive to Judge Swygert's keenly articulated concern that the connection between Galloway and the mailings is quite attenuated. In my view, however, the link is not so tenuous as to avoid the judicially hypertrophied reach of this far-ranging statute.

SWYGERT, Senior Circuit Judge, dissenting

I respectfully dissent because I do not believe that the mailings in the case furthered, in any way, the scheme to defraud. In reaching the opposite conclusion, the majority has completely misinterpreted *Ohrynowicz v. United States*, 542 F.2d 715 (7th Cir.), *cert. denied*, 429 U.S. 1027, 97 S.Ct. 650, 50 L.Ed.2d 630 (1976), and has failed to distinguish *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), on anything but a superficial basis.

The majority has interpreted *Ohrynowicz* to hold that where a mailing is a "normal concomitant of a transaction that was essential to the fraudulent scheme, [the mailing] was made for the purpose of executing that scheme." Maj. op. at 163. *Ohrynowicz* does not stand for the proposition that *every* mailing which is a normal concomitant of an essential transaction provides the requisite jurisdictional basis for a mail fraud conviction. Any other interpretation is inconsistent with *Maze v. United States*, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). In *Maze*, the defendant stole a credit card and used it to charge food and lodging at several motels. The invoices mailed from the motels to the bank which issued the credit card were certainly a normal concomitant of the credit card transaction, yet the Supreme Court affirmed the acquittal of the defendants on the mail fraud charge because these mailings did not further the scheme. Thus determining that a mailing is a normal concomitant of an essential transaction is only the beginning of the inquiry. I agree that the mailings in this appeal are a normal concomitant of the retail sale of the car. Nevertheless, they did not further the scheme. They did not affect the price paid for the car, conceal the alteration of the odometer,

cause any benefits to flow to Galloway, or cause any further harm to the retail purchasers of the car.

In *Ohrynowicz* and *United States v. Clark* (also cited by the majority), this court found the mailings to be "normal concomitants," but was also careful to point out how the mailings furthered the scheme. In the instant case, the majority has concluded that the mailings were "more than normal concomitants" without establishing the factual basis for its conclusion.[1] According to the majority, the retail sale was an essential transaction, the transfer of title was necessary to complete the retail sale and the mailing was a means of executing the transfer to title. It must be remembered that Galloway had nothing to do with the cars after he delivered them to the Auction. Thus, these mailings were only a convenient means of effecting a transaction to which Galloway was not a party.[2] The connection between Galloway and the mailings is too attenuated to fall within the ambit of the mail fraud statute.[3] A review of *Maze* and other cases supports this conclusion.

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[1]The majority claims that the mailings were an "integral part" of an essential transaction. Given that the retail sale was an essential transaction, it does not follow that the mailing was an integral part of that transaction. The transfer of title may be an integral part of a retail transaction but this occurs at the Department of Motor Vehicles. The mailing was just a convenient procedure for moving the documents from the dealer to the Department of Motor Vehicles. The mailing itself did not produce the transfer of title. It was simply a normal concomitant of the retail sale.

[2]Where the mailings in a mail fraud scheme arise from a transaction in which the party perpetrating the fraud does not participate, I believe that the courts should be very careful to clearly establish the connection between the mailing and the defendant. *See United States v. Lea*, 618 F.2d 426, 432 (7th Cir. 1980) (Cudahy, J., *dissenting*).

[3]If the cars had been sold from one dealer to another before being sold to a retail customer, the mailing would have been even further removed from Galloway, as the Department of Motor Vehicles does not register transfers of title between dealers. I do not believe that the majority would have any trouble concluding that the mailing in this hypothetical case would be too attenuated to provide the basis for a mail fraud conviction. Unless the majority is prepared to agree

The majority has narrowed the holding in *Maze* to one sentence: there is no mail fraud liability where the mailings increased the probability that the fraudulent scheme would be detected. *Maze* does not stand for this proposition. *Maze* said that the mailings involved did not further a scheme to defraud in a specific fact situation. The fact that the mailings increased the likelihood of detection was only evidence that they did not further the scheme; it was not the crux of the holding. Any other conclusion ignores the fact that many mailings may both further the scheme *and* increase the likelihood of detection.[4] Given this, it must be determined whether the facts in *Maze* are analogous to the facts in this appeal. I believe that they are. In both cases, the transactions from which the mailings arose were essential to the completion of the scheme. In both cases, the mailings were a normal concomitant of the essential transaction. In *Maze*, the mailings were directed to the end of adjusting accounts among the victims of the defendant's scheme. In this appeal,

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that both fact situations (the hypothetical and the instant case) fall within the reach of the statute, we have a situation where the defendant's involvement is identical in both cases and yet one is mail fraud, the other is not.

This hypothetical is by no means improbable. In fact, of the thirteen cars with rolled-back odometers, one was sold at the Chicago Auction to a dealer who subsequently sold it to a third dealer. Galloway was not convicted for mail fraud with respect to this automobile. (Only six of the thirteen transactions were included in the indictment.)

Also, if the dealers had sold the cars to out of state consumers, no mailing would have occurred. Where a mail fraud conviction hangs so precariously on the actions of a nondefendant, I believe the courts should view this as evidence of the attenuation between the mailing and the defendant.

[4]This is exactly what happened in *Ohrynowicz*. 542 F.2d at 718. The mailings increased the likelihood of detection but also helped to temporarily conceal the illegal nature of the scheme. The court concluded that these mailings furthered the scheme, after a discussion of *Maze*. Thus a finding that a mailing increases the possibility of detection is only a factor to be weighed with all the other facts; it is not determinative of whether *Maze* applies in a given case.

the mailings were used to bring about the transfer of title between the victims of Galloway's scheme. In *Maze*, the scheme did not depend on who bore the loss; here, the success of the scheme did not depend on how the transfer of title was completed. In *Maze*, whomever ended up with the invoice bore the loss. In this case, whomever ends up with title bears the loss. I fail to see any valid distinction between the facts in this case and in *Maze*. Despite all these similarities, the majority focuses on the one difference between the two cases and dismisses *Maze* as precedent. As pointed out above, this solitary distinction was not essential to the holding in *Maze*.

Kann v. United States, 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944), is also analogous. In *Kann*, corporate officers and directors were accused of diverting profits from their own corporation to a dummy corporation. As part of the scheme, the defendants obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. The Supreme Court held that the fraud was completed at the point at which defendant cashed the checks:

> The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires. 323 U.S., at 94, 65 S.Ct., at 151.

As in *Kann*, Galloway irrevocably received the money from the fraud. It was immaterial to him how the title to the car was transferred from the dealer to the consumer.

I also find the *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), line of cases helpful in determining whether the mailings in this case are sufficiently related to the fraudulent scheme. (Although the majority touches on *Parr*, it has ignored *Parr's* progeny, *United*

States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977). In *Parr*, the Supreme Court held that intrinsically innocent routine mailings required by law did not further a scheme even when they occurred during the course of the scheme. In *United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977), the Third Circuit reasoning from *Parr* decided that there is no

> valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or covenient procedure of a legitimate business enterprise. In either case the mailings themselves are not sufficiently closely related to the fraudulent scheme to support a mail fraud prosecution.

561 F.2d at 472. The mailings in this appeal fall within the parameters of this reasoning. The transfer of the automobile titles through the post office was a routine mailing performed by Wisconsin dealers as a service to their customers. The dealers are legitimate business enterprises and the mailings were intrinsically innocent and used to carry out a convenient procedure of the dealership.[5]

The majority has also advanced the argument that the mailings in issue furthered the scheme because successful title transfer helped ensure Galloway's good will among Wisconsin dealers thus facilitating his abilities to sell more cars at the Chicago Auction. The mailings, however, did no more to ensure Galloway's access to the Chicago Auction than the mailings in *Kann*, *supra*, did to ensure the defen-

[5]The majority has dismissed the routine business mailing argument claiming that the mailings in *United States v. Shryock*, 537 F.2d 207 (5th Cir.), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1976), were necessitated by law but were still within the purview of the mail fraud statute. This is patently wrong. The mailings in *Shryock* were not necessitated by law; the law only required that a form containing an odometer statement accompany the application for transfer of title. The law did not specify how the form was to be delivered. The correct case for determining the legal impact of a mailing of this type is *United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977).

dants' access to bank services or the mailings in *Maze, supra,* did to further the defendant's access to the motel market.[6]

At this point I find it necessary to distinguish *United States v. Shryock,* 537 F.2d 207 (5th Cir.), *cert. denied,* 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1976). *Shryock* also involved a scheme to roll back odometers but in that case, the roll back and the mailings were caused by a retail dealer. The mailings contained a falsified statement of the odometer reading. The *Shryock* mailings thus furthered the scheme by helping to cover up the true odometer reading. In the instant case, the mailings did not contain an odometer reading and they involved a transaction to which Galloway was not a party. In applying *Shryock,* the majority has failed to recognize that where a defendant is not involved in a transaction, a mailing which results from that transaction is more remote from the defendant than if he was involved in the transaction.

In conclusion, I believe the mailings were not "sufficiently closely related to respondent's scheme to bring his conduct within the statute." *United States v. Maze, supra,* 414 U.S. at 399, 94 S.Ct. at 648. The mailings did not conceal the fraud, produce profit for Galloway or contribute to the consumer's harm. The mailings resulted from a transaction to which Galloway was not a party and they were routine business mailings the purposes of which were immaterial to Galloway.

For the above reasons, I respectfully dissent.

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[6]The contention that title transfer is necessary to ensure Galloway's access to the Chicago Auction ignores the realities of this market, and Galloway's interaction in it. There are 4,800 dealer-buyers registered at the Auction and during the eighteen months pertinent to the indictment, Galloway sold 756 cars at the Auction. If title were to fail on one of Galloway's cars, it is unreasonable to conclude that 4,800 dealer-buyers would blacklist all his cars. The majority's conclusion that Galloway relied on Wisconsin dealers to return to the Auction to purchase more of his cars is refuted by these facts. Galloway did not know who would buy his cars. How could he rely on them to return to the Auction? Further, the evidence also is clear that Galloway sold used cars at other auctions throughout the United States.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

v.

PHILLIP E. GALLOWAY,
Defendant.

OPINION AND ORDER
80-CR-55

At the close of all of the evidence in this case, defendant moved for a judgment of acquittal on which I reserved a ruling, pending the verdict of the jury. After the jury returned a verdict against defendant of guilty on all six of the counts with which he was charged, the motion was renewed and is now before the court.

In order to find the defendant guilty of any one of the counts, the jury had to find beyond a reasonable doubt that the defendant knowingly devised a scheme to defraud and that he caused some matter or thing to be sent in the United States mail for the purpose of executing this scheme. 18 U.S.C. §1341. The jury made both findings, concluding, implicity, that thirteen sales to Wisconsin automobile dealers of used cars with altered odometers evidence a "scheme to defraud" and that the subsequent mailing by the Wisconsin dealers of applications for title were mailings caused by the defendant (or reasonably foreseeable by the defendant) for the purpose of executing his scheme.

Essentially, the evidence at trial established the following: Defendant bought, for resale, approximately thirteen used automobiles from various automobile dealers. At or about the time each car was purchased by defendant the odometer showed a mileage reading in excess of what it showed at the time it was resold by defendant.

The majority of these thirteen cars were resold by defendant to Wisconsin automobile dealers through the Greater Chicago Auto Auction, although in a few instances defendant sold cars directly to a Wisconsin dealer whose agent he had come to know socially. In either case, defendant supplied an Alabama automobile "tag" signifying ownership of the car by Galloway Motors and an odometer statement. For sales through the auction, the defendant turned the documentation over to the auction office immediately after each sale; for the sales made directly to the Wisconsin dealer, defendant gave the documentation to the dealer's representative. Defendant received the full purchase price for his cars at the time of the sale, whether he sold them at auction or directly to his friend.[1] Once the cars were sold, defendant had no continuing financial interest in any one of them.

The Wisconsin dealers drove or shipped the cars back to Wisconsin, where they were sold eventually to retail customers. At the time of the retail sale, but not earlier, the Wisconsin dealer would apply for title on behalf of the retail purchaser, by mailing to the state Department of Motor Vehicles an application for title, together with the State of Alabama Motor Vehicle Registration and Tag Receipt in the name of Galloway Motors. Neither the application for title nor the tax receipt incorporated an odometer statement, as none was required by the Wisconsin Department of Motor Vehicles.

Had the dealers been unable to obtain title for the new owners of the cars, they would have been obliged to rescind the contract of sale. Had the dealers not received the titles to the cars they purchased at the Greater Chicago Auto Auction, they would have been entitled to return the cars and obtain a full refund of the purchase price from the auction, which guaranteed clear title as one of its services.

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[1]For the cars sold through the auction, defendant received slightly less than the "full" purchase price because the auction deducted a small commission.

Both the Wisconsin wholesalers and their retail customers paid higher prices for the Galloway Motors used cars than they would have had the odometers registered the true mileage on the cars.

Defendant operated his business, Galloway Motors, as a sole proprietorship. He alone had the financial incentive to alter the odometer readings on the cars which he bought and sold.

The jury had sufficient evidence from which to find that the defendant had formulated and carried out a scheme to defraud; that is, a scheme in which defendant first purchased good-looking, high-mileage cars, then turned back the odometers on the cars to show a lower mileage, and prepared, or authorized the preparation of, an odometer statement reflecting the altered odometer reading, after which he resold the cars to dealers throughout the country for higher prices than he could have obtained had the true mileage shown on the odometer, thus defrauding the dealers and, ultimately, the retail customers of those dealers.

Also, the jury had sufficient evidence from which to find that the defendant "caused" the mailings of the title applications by the Wisconsin dealers; that is, that he could reasonably have foreseen that the mails would be used in the course of transferring physical possession and title of the cars to the retail customers.

The only question remaining is whether the jury had sufficient evidence from which to find that the use of the mails was "for the purpose of executing" the defendant's scheme to defraud. In my opinion, the evidence on this issue was insufficient to sustain defendant's conviction.

The deficiency results, not from a failure on the government's part to prepare its case thoroughly or to produce the right witnesses, but from the nature of the scheme itself, which was designed to obtain from wholesale purchasers more money for the Galloway Motors cars than they were worth.

The mailings did nothing to further the scheme of obtaining more money for the cars. The transfers of title, which necessitated the mailings, would have occurred whenever the cars were sold, for whatever price.

To suggest that the mailings "furthered" defendant's scheme misconceives the nature of the scheme. Had the scheme been one to sell a product that had no value whatsoever (a fraudulent cancer cure, for example) or a scheme to sell a product the seller did not own, the transfer of the indicia of ownership would have been critical to the execution of the scheme. In either of those circumstances, the seller (schemer) would have a clear interest in completing the entire process of title transfer.

In defendant's case, however, the scheme was complete for his purposes when the retail customer agreed to the selling price and took physical possession of the car. The subsequent transfer of title did not affect the selling price of the car; it did not cause any money to flow to defendant who had received the fruits of the scheme weeks earlier; and it did not contribute to the concealment of the fraud.

On this last point the evidence is clear: had any problems arisen which prevented the transfer of title, the dealers would have had recourse to defendant himself or to the Greater Chicago Auto Auction, either to obtain the missing title documents or, if necessary, to obtain a refund of the purchase price of the automobile. But nothing in the breakdown of the application process would have led to the discovery of the odometer alteration. Thus, the mailings cannot be said to have had a "lulling" effect on the retail consumers, in the sense that they kept the buyers from discovering the fraud. *CF., United States v. Sampson*, 371 U.S. 75 (1964); *United States v. Edwards*, 458 F.2d 875 (5th Cir. 1972); *United States v. Goldberg*, 401 F.2d 644 (2d Cir. 1968).

The government advances four reasons to support its contention that the mailings furthered the defendant's scheme:

1. Each mailing was an incident of an essential part of the scheme, or "a normal concomitant of a transaction" that is essential to the fraudulent scheme. *Ohrynowicz v. United States*, 542 F. 2d 715, 718 (7th Cir. 1976); *United States v. Lea*, 618 F. 2d 426 (7th Cir. 1980). The mailings here were incident to the retail sales of the cars; the retail sales were essential to the continued success of defendant's scheme; therefore, the mailings come within the statute.

2. While each separate mailing might be viewed as outside the life of the scheme, they should properly be viewed as part of an on-going scheme in which defendant required a continuing market of willing Wisconsin buyers, who would not have continued to buy cars had they not been able to obtain title.

3. The mail fraud statute is to be interpreted broadly with respect to the jurisdictional aspect.

4. Had defendant operated a retail sales business in Wisconsin and engaged in a similar scheme of rolling back odometers, the mailings of the title applications would have clearly furthered the scheme. Defendant should not be permitted to insulate himself from federal criminal prosecution by putting the wholesale sales between himself and the retail customer.

Of these arguments, the first is the most persuasive. The remaining three require little discussion. The second argument is essentially indistinguishable from the first; the third argument states a proposition but does not supply the justification necessary to sustain the proposition; and the final argument misstates the facts. Defendant was not charged with use of the mails in connection with his own transfer of the cars; had he been, and had the evidence supported that charge, this would be an easy case to decide in the government's favor. Obviously, the successful completion of the transfer of his cars to their buyers was essential to defendant's scheme. However, the facts of the case show that defendant accomplished the transfers of both physical pos-

session and title without using the mail. It is the fact that the use of the mails occurred so far down the line from defendant and with so little apparent relationship either to the success of the scheme or to the harm caused the retail purchasers which makes this case a difficult one.

I return to the government's first argument: that the mailings were in furtherance of the scheme because they were a normal concomitant of an essential transaction.

To begin the analysis, I accept the government's contention that the defendant's scheme was not complete until the cars had been resold to retail customers in Wisconsin. Although defendant contends that the scheme should be viewed as having been completed when defendant sold the cars at auction and received the purchase price, I find the government's contention more persuasive; that is, that the profitable resale of the cars to retail customers was crucial to defendant's ability to continue the scheme. However, it does not follow necessarily from this conclusion that the subsequent mailings are so closely related to the scheme that they could be said to have been for the purpose of executing the scheme.

I am not persuaded that every mailing which accompanies or follows an act essential to a fraudulent scheme supplies the requisite jurisdictional basis for prosecution under §1341. Such a result would be inconsistent with a fair reading of the statute or of the case law. *United States v. Maze*, 414 U.S. 395 (1974) supports this conclusion. In *Maze*, the Court held that §1341 did not apply to a scheme in which the defendant used a stolen credit card to make charges in California, although the mails were used to transmit the charges back to the issuing bank. The Court reasoned that, since the mailings hastened the discovery of the defendant's scheme, they could not be said to have furthered his scheme. It pointed out that

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a re-

> sult of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails 'be for the purpose of executing such scheme or artifice. . . .'

Id., at 405.

The cases decided by the Court of Appeals for the Seventh Circuit are in accord in holding that mailings which are merely incidental to a scheme are not sufficient to support conviction, *United States v. Keane*, 522 F. 2d 875 (7th Cir. 1974). A close review of the Seventh Circuit cases which use the "normal concomitant" standard shows that, in those cases, the mailings were steps toward the fruition of the scheme and that they occured within the chronological life of the scheme.[2]

Because, in this case, the mailings came chronologically after the scheme had reached fruition; that is, after the consumer had agreed to pay the higher price for the car, and

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[2]For example, in *Ohrynowicz v. United States*, 542 F. 2d 715 (7th Cir. 1976), the "concomitant" mailing was that of causing the bank to mail an order for personalized checks in connection with the opening of a new checking account by coconspirators who had devised a a check writing scheme to defraud banks. The court noted that the mailing aided the conspirators in obtaining the blank checks they needed for their scheme and also that it took place before the scheme reached fruition.

In *United States v. Lea*, 618 F. 2d 426 (7th Cir. 1980), the concomitant mailings were those of brokerage confirmations and statements from the broker from whom defendant received kickbacks as a meat buyer for a chain of grocery stores. The court held that the mailings furthered the scheme by facilitating receipt of the commission checks which served as the funds for the payments to defendant.

In *United States v. Craig*, 573 F. 2d 455 (7th Cir. 1977), the mailings were notices of meetings of the commission before which legislation was introduced. The mailings aided the perpetrators of a scheme to procure favorable legislation through bribery by advising them of strategic steps in the advancement of that legislation.

And, in *United States v. Castor*, 558 F. 2d 379 (7th Cir. 1977), where the mailings in question were notices of hearings to be held on applications for liquor store licenses, the court found that the mailings furthered a scheme to obtain such licenses through "fronts" because the notices advised both the "front" person and the real person in interest of the hearings to be held on the application.

because the mailings did nothing to affect the price paid for the car or to conceal the alteration of the odometer, I find and conclude that the mailings of the applications for title were not sufficiently closely related to his scheme to bring defendant's conduct within 18 U.S.C. §1341.

Therefore, I find and conclude that the evidence adduced at trial does not support the essential finding that the mailings of title applications by Wisconsin dealers to the Wisconsin Department of Motor Vehicles were for the purpose of executing defendant's scheme. I conclude that in the absence of such proof, the defendant's conviction must be overturned.

ORDER

IT IS ORDERED that the defendant's motion for judgment of acquittal made at the close of all the evidence is GRANTED; the jury's verdict of guilty on six counts is SET ASIDE; and judgment of acquittal is entered for the defendant on all six counts.

Entered this 31st day of March, 1981.

BY THE COURT:

/s/ Barbara B. Crabb

BARBARA B. CRABB
District Judge

APPENDIX C

Opinion by Judge Sprecher
Judge Cudahy Concurring
Judge Swygert Dissenting

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 17, 1981.

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 81-1693 vs.

PHILLIP E. GALLOWAY,
Defendant-Appellee.

Appeal from the United States
District Court for the Western
District of Wisconsin.
No. 80-CR-55
Judge Barbara B. Crabb

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with directions, in accordance with the opinion of this court filed this date.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 22, 1981.

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 81-1693 vs.

PHILLIP E. GALLOWAY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 80 CR 55
Barbara B. Crabb, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellee, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel* have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Judge Swygert voted to grant rehearing.

Opposition

Office - Supreme Court, U.S.
FILED
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No. 81-1651

In the Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIP E. GALLOWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to show that the mailings in this case were "for the purpose of executing" petitioner's fraudulent scheme, within the meaning of the mail fraud statute, 18 U.S.C. 1341.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 664 F. 2d 161. The opinion of the district court (Pet. App. A17-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1981. A petition for rehearing was denied on December 22, 1981. The petition for a writ of certiorari was filed on February 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341. Following the verdict, the district court directed a judgment of acquittal on each count. The court of appeals reversed (Pet. App. A1-A16).

As described in the opinion of the court of appeals (Pet. App. A2-A3), the evidence at trial showed that petitioner, a used car wholesaler, rolled back the odometers on 13 cars and then sold the cars to Wisconsin retail dealers, primarily through the Greater Chicago Auto Auction.[1] The dealers shipped or drove the cars to Wisconsin, where they were sold to retail customers. To complete the sales, the Wisconsin dealers applied for title on behalf of their customers by mailing the necessary documents to the Wisconsin Department of Transportation.

The district court found that this evidence was sufficient to establish that petitioner had engaged in a scheme to defraud since both the retail dealers and their customers had paid inflated prices for the cars they purchased as a result of the false odometer readings (Pet. App. A19). The court also found the evidence sufficient to show that petitioner "caused" the mailing of the title applications, within the meaning of 18 U.S.C. 1341, in that "he could reasonably have foreseen that the mails would be used in the course of transferring physical possession and title of the cars to retail customers" (*ibid.*). The district court noted that the ultimate victim of petitioner's scheme was the retail purchaser (Pet. App. A19) and that defrauding the retail purchaser was a part of petitioner's scheme (see *id.* at A20). Nevertheless, the court concluded that the evidence was insufficient to support the jury's implicit conclusion that the mailing of the title documents was "for the purpose of executing" petitioner's fraudulent scheme (*ibid.*).

In reversing, the court of appeals held that "the title application procedure, from [petitioner's] provision of the title documents to their mailing to the state agency, was an essential step in [his] scheme" (Pet. App. A9). At bottom,

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[1] Petitioner sold a few of the cars directly to a retail dealer.

petitioner's "scheme was an attempt to defraud Wisconsin retail purchasers" (*id.* at A4). The inflated wholesale prices that resulted from petitioner's tampering with the odometers were reflected in the retail prices, so the victims were the retail purchasers. In addition, of course, the retail purchaser's decision to purchase a car was based in part on the altered odometer reading. Thus, without an effective transfer of title, "the final step in the scheme," the retail sale of the cars, would have been incomplete. The court further noted that the future success of the scheme "required a *continuing* access to retail dealers * * *" (*id.* at A8; emphasis in original), and that any failure in the title application process would have endangered the scheme "by discouraging the retail dealer from making further purchases of [petitioner's] automobiles" (*ibid.*). Successful transfers of title thus "ensured petitioner's continued ability to reap the profits of his odometer tampering" (*id.* at A9).

ARGUMENT

Petitioner contends that the evidence was insufficient to support his conviction for mail fraud. He does not deny that he defrauded the retail dealers and their customers through his odometer rollback scheme, or that he "caused" the mailing of the title documents. His only submission is that the government's proof fell short of establishing that the mailing of the title documents was "for the purpose of executing" his fraudulent scheme, within the meaning of 18 U.S.C. 1341. Turning as it does on the particular facts of this case, petitioner's claim does not warrant review in this Court. In any event, the claim is without merit.

Both the court of appeals (Pet. App. A4) and the district court (*id.* at A20) correctly concluded that defrauding retail purchasers was an integral part of petitioner's scheme,

although he was paid by the retail dealers alone.[2] To sell the cars, it was necessary to transfer title. Mailing of the title documents, which petitioner had provided to the retail dealers directly or through the Auction, was therefore an essential part of the scheme.[3] See *United States* v. *Shyrock*, 537 F. 2d 207 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977). The mailings in this case were central to the success of petitioner's scheme, as it was described by the courts below. Compare *Pereira* v. *United States*, 347 U.S. 1, 5, 8 (1954); see also *United States* v. *Maze*, 414 U.S. 395, 401-402 & n.5 (1974). They were, therefore, more than "sufficiently closely related to * * * [petitioner's] scheme to bring his conduct within the statute" (*United States* v. *Maze*, *supra*, 414 U.S. at 399).

Petitioner's reliance on *United States* v. *Maze*, *supra*, and *Kann* v. *United States*, 323 U.S. 88 (1944), is unavailing. In *Maze*, the defendant used a stolen credit card to charge food and lodging at several motels. The use of the mails relied on in that case occurred when the merchants mailed the sales slips reflecting the purchases to the issuing bank, which in turn mailed them to the cardholder. Taking the view that the defendant's "scheme reached fruition when he checked out of the motel" (414 U.S. at 402), this Court held that the subsequent mailing of the invoices was insufficient to support the mail fraud conviction. See also *Parr* v. *United States*, 363 U.S. 370, 392-393 (1960). *Kann* v.

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[2] *United States* v. *Sampson*, 371 U.S. 75 (1962), makes it plain that a mailing that occurs after the money of some of the victims is safely in hand may nonetheless support a mail fraud conviction so long as the mailing is part of the scheme.

[3] Indeed, if the dealers who purchased cars through the Auction had been unable to obtain title to the cars, they would have been entitled to a refund of the full purchase price from the Auction. See Pet. App. A18. Thus, transfer of title to the retail customers was important because of the ongoing nature of the scheme. See Pet. App. A9 n.5.

United States is similar. In that case, a number of corporate officers and directors diverted corporate funds by having a dummy corporation, specifically established for the purpose, issue them checks. The Court held that mailing of the checks to the drawee bank for collection by the bank at which the checks were cashed or deposited was insufficient to support mail fraud convictions because the scheme "reached fruition" when the checks were cashed or deposited. 323 U.S. at 93-94. By contrast, the mailings in this case were essential to both the initial success of petitioner's scheme to defraud retail purchasers and its continued success.

For substantially the same reason, petitioner's assertion that the decision of the court of appeals in this case conflicts with *United States* v. *Alston*, 609 F. 2d 531 (D.C. Cir. 1979), cert. denied, 445 U.S. 918 (1980), and *United States* v. *Keenan*, 657 F. 2d 41 (4th Cir. 1981), is mistaken. In both cases, on facts that bear no similarity to the facts in this case, the courts concluded that the mailing or mailings occurred after the fraudulent scheme had come to fruition.[4]

In *United States* v. *Tarnopol*, 561 F. 2d 466, 472-473 (3d Cir. 1977), the Third Circuit held that invoices mailed to the defendants' employers were insufficiently connected to their scheme, which began with respect to each transaction only after the mailings. Cf. *Parr* v. *United States*, *supra*,

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[4]In *Alston* the defendant falsified credit information in the files of individuals who otherwise may have been unable to obtain credit. The court concluded that the mailing of installment sales contracts to the lending institutions mislead by the false information was insufficiently related to the scheme. In *Keenan*, the defendant purchased equipment that had been fraudulently obtained by an accomplice through use of his employer's name. The court held that the scheme was complete when the defendant received the equipment and the seller's subsequent mailing of an invoice to the accomplice's employer was too remote to support a mail fraud conviction.

363 U.S. at 391.[5] Petitioner apparently relies on the language in *Tarnopol* suggesting that routine mailings occurring in the ordinary course of business, such as the title document mailings at issue here, cannot support a mail fraud conviction. Whatever the merits of that proposition (see, *e.g., Pereira* v. *United States, supra,* 347 U.S. at 8; *United States* v. *Shyrock, supra*), the Third Circuit has made it clear that *Tarnopol* "did not *hold* that a 'routine business mailing' which is closely bound with the scheme cannot support a mail fraud charge." *United States* v. *Brown,* 583 F. 2d 659, 667 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979) (emphasis added).

The decision of the court of appeals in this case is consistent with the decisions of this Court and does not conflict with the holding of any other court of appeals. As noted at the outset, petitioner essentially seeks to have this Court review the court of appeals' application of well settled principles to the facts of this case.

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[5]The defendants in *Tarnopol* diverted substantial sums of their employers' money to their own purposes and for the purpose of making improper payments to radio station personnel to secure favorable treatment. The invoices for some sales, generally cash sales, were concealed and the receipts used to create the fund out of which the improper payments were made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982